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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-811

THE CITY OF EL PASO,

Petitioner,

versus

DARBYSHIRE STEEL COMPANY, INC., EL PASO MACHINE & STEEL WORKS, INC., and ROBBERSON STEEL, INC.,

Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondents pray that the Court refuse Writ of Certiorari in this case.

QUESTION PRESENTED

Whether the Fifth Circuit properly held that *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971) controlled the result in this case.

STATEMENT OF THE CASE

The significant facts are properly stated in the opinions of the courts below. The key dates are:

> August 10, 1970 — The date the City signed its contract with McKee (general contractor) for the construction of El Paso's Civic Center Complex;
>
> September 4, 1970 — The date McKee signed the structural steel subcontract purchasing the steel from Respondents; and
>
> August 19, 1975 — Four years, eleven months later when the City filed its suit.

The case is before this Court on a question of antitrust limitations. Respondents emphasize that the evidence establishes that there was no conspiracy — Respondents openly formed a joint venture to submit one bid for work which no one of them could perform alone, a practice lawful under the *Penn-Olin* rule*. In order that a combined bid could be submitted, each venturer agreed to prepare a part of the bid and to perform its agreed part of the work. Petitioner's description of the Respondents' activities at page 5 of its Brief fails to note that the agreements and conduct it seeks to condemn are inherent in a joint venture arrangement. The efficiencies achieved by the internal agreement are reflected in Respondents' bid which was some $51,000.00 lower than the next competing bid.

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* *U.S. v. Penn-Olin Chemical Co.*, 378 U.S. 158 (1964).

ARGUMENT

Based on the faulty premise that *Zenith* does not apply to continuing conspiracy cases (and that this case is a continuing conspiracy case), Petitioner argues that *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), and not *Zenith*, governs and that the Fifth Circuit erred in applying *Zenith* resulting in a conflict with the opinions of other circuits.

Even if Petitioner's claim that this is a continuing conspiracy case were correct (which is denied), the argument is without merit. This Court held *Zenith* applicable to continuing conspiracy cases:

> *"In the context of a continuing conspiracy to violate the antitrust laws, such as the conspiracy in the instant case,* this [the rule on accrual of causes of action] has usually been understood to mean that each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act." (Emphasis added.) 401 U.S. at 338.

The Fifth Circuit properly applied *Zenith* in holding that Petitioner was required to file its suit for damages within four years of the date they were incurred. In *Zenith*, this Court said:

> "Thus, if a plaintiff feels the adverse impact of an antitrust conspiracy on a particular date, a cause of action immediately accrues to him to recover all damages incurred by that date and all provable damages that will flow in the future from the acts of the conspirators on that date. To recover those damages, he must sue within the requisite number of years from the accrual of the action. On the other hand, it is hornbook law, in antitrust actions as in others, that even if injury and a cause of action have accrued as of a certain date, future damages that might arise from the conduct sued on are unrecoverable if the fact of their accrual is speculative or their amount and nature unprovable." 401 U.S. at 339.

When, therefore, the plaintiff's damages can be proved with that degree of certainty required by law, the statute begins running as to those damages. If damages are not then provable with the required certainty, the statute does not begin to run until they become provable.

Since *Zenith* applies to continuing conspiracies and was decided after *Hanover Shoe*, it controls the result in any event. Claims of conflict between Circuit Courts are immaterial. The question is simply whether the Fifth Circuit has properly applied the applicable Supreme Court holding which must be *Zenith*.

In this case, by September 4, 1970 the alleged conspiracy had been formed and had, under Petitioner's allegations, succeeded in its sinister purpose — the elimination of bidding competition resulting in a steel subcontract at an allegedly inflated price. By September 4, 1970, then, the City had felt the adverse impact of the alleged conspiracy in that the market for the subcontract had been foreclosed and the alleged artificially high price set and agreed to. The City has admitted that immediately following the bidding, and prior to contract, it performed its own studies of the reasonableness of the structural steel price. The City's damages would have been measured by the difference between a truly competitive price and the allegedly fixed price. As the Fifth Circuit held, such damages were as capable of ascertainment and proof in 1970 as in 1975. Thus, almost five years prior to filing its suit, Petitioner could have proved the elements of its antitrust case including the amount of its alleged damages.

The Fifth Circuit's decision should also be affirmed under the holding of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). Petitioner did not purchase the steel directly from Respondents. Petitioner purchased the structural steel (in the form of the completed Civic Center) from McKee who in turn had purchased it from Respondents. Since Petitioner was an indirect purchaser only, under *Illinois Brick* it lacks standing to bring this suit and for that reason the Fifth Circuit's judgment should be affirmed.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on this ____ day of December, 1978, three true and correct copies of Respondents' Brief have been forwarded to Mr. George R. Poehner, Coke & Coke, 3600 First National Bank Building, Dallas, Texas 75202; Mr. Tom Diamond, Diamond, Rash, Leslie & Smith, 1208 Southwest Bank Building, El Paso, Texas 79901, Attorneys of Record for The City of El Paso, Petitioner; and to Mr. John C. Ross, Jr., City Attorney, The City of El Paso, City-County Building, El Paso, Texas 79901.

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